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IN THE

Supreme Court of the United States

October Term, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,
Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and FRANK S. HOGAN, as District Attorney of New York County,
Appellees,

MOTION TO DISMISS

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Appellees.

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of he Supreme Court of the United States, appellees move to dismiss the appeal in the above-entitled action on the ground that it does not present a substantial federal question.

Opinion Below

On July 7, 1966, the New York Court of Appeals rendered an opinion, not yet officially reported, which is set forth in the Appendix.

Statement

This is a motion to dismiss a direct appeal from a judgment of the Court of Appeals of the State of New York which affirmed a judgment of the Supreme Court of the State of New York, New York County, declaring that Sections 484-h and 484-i of the New York Penal Law are constitutional.

In two recent decisions, *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409 (1964) and *People* v. *Kahan*, 15 N. Y. 2d 311 (1965), the Court of Appeals of the State of New York invalidated former Section 484-h of the New York Penal Law on the ground of vagueness. Subsequently the Legislature enacted the present Sections 484-h and 484-i of the New York Penal Law to fill the void left by *Bookcase* and *Kahan*. The appellants sought a declaratory judgment that the two new sections were unconstitutional, and an injunction against prosecution. Their sole contention is that any statute that seeks to prohibit the dissemination of certain literature to those below a designated age is *ipso facto* unconstitutional. The appellants moved for summary judgment. On February 4, 1966, the Supreme Court of the State of New York, New York County (Tilzer, J.) denied that motion and, granting the appellees' cross-motions, held the sections constitutional. The appellants appealed directly to the Court of Appeals of the State of New York which affirmed the judgment of the lower court, holding the sections in question to be constitutional.

Statutes Involved

§484-h. Exposing minors to harmful materials.

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity,

sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which

contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor. Added L. 1965, c. 327, eff. Sept. 1, 1965.

§484-i. Sale or delivery of pornographic material to minors under the age of eighteen.

Any person who knowingly sells, lends or gives away to a person actually or apparently under the age of eighteen years:

1. Any photograph, drawing or similar representation, whether singly or in sets or contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between

the sexes and which shows, depicts or reveals such person or persons:

(a) with less than a fully opaque covering of his or her genitals, pubic areas or buttocks, and, if that person is a female, with less than fully opaque covering of any portion of the breast below a point immediately above the top of the areola, or

(b) with his or her genitals in a state or condition of sexual stimulation or arousal, or

(c) engaged in an act or acts of masturbation, homosexuality, or sexual intercourse, or in physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, or

2. any collection, series or combination of photographs, drawings or similar representations, whether or not contained in books, "pocket books", pamphlets or magazines, or any motion picture film, of any person or persons of the age of puberty or older, posed or presented in such a manner as to exploit lust for commercial gain and depicted or shown in such a posture or way that the viewer's attention or concentration is primarily focused on that person's or those persons' genitals, pubic areas, buttock or buttocks, female breast or breasts, and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes, or

3. any book, "pocket book," pamphlet or magazine, phonograph record, tape or similar electronic reproduction

of sound, containing details, descriptions, or narrative accounts of:

(a) the genitals in a state or condition of sexual stimulation or arousal, or

(b) acts of masturbation, or

(c) acts of homosexuality, or

(d) acts of sexual intercourse, or

(e) acts of physical contact with another person's genitals, pubic areas, buttock or buttocks or the breast or breasts of a female, which contact is made in an act of sexual stimulation, gratification or perversion, which details, descriptions or narrative accounts are written or presented in such a manner as to exploit lust for commercial gain and which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes and which are to be distinguished from flat and factual statements of the facts, causes, functions or purposes of the subject of the writing or presentation, such as would be found in bona fide medical or biological textbooks, shall be guilty of a misdemeanor.

For the purposes of this section, "knowingly" shall mean having knowledge of the character and content of any item described in this section, or failure to exercise reasonable inspection which would disclose the character and content of the item.

If any part or provision of this section or its application to any person or circumstances is for any reason adjudged invalid or unconstitutional by a court of competent jurisdiction, such judgment shall be limited in its effect to the facts in-

volved in the controversy in which such judgment shall have been rendered and shall not affect the validity of the remainder of this section or its application to other persons and circumstances; and the legislature hereby declares that it would have enacted this section without the invalid part, provision or application had such invalidity been apparent. Added L. 1965, c. 372, eff. July 1, 1965.

POINT I

The federal question is not timely or ripe for review.

Sections 484-h and 484-i of the New York Penal Law were enacted specifically to prohibit the exposure of erotic material to minors, and thus they enjoin dissemination or exhibition of certain types of books, photographs, motion pictures, and similar material to persons under certain ages [seventeen years in 484-h; eighteen years in 484-i]. And taking into consideration the peculiar susceptibility of minors to such material, the legislature included in its proscription matter which could properly be sold to adults.

Appellants have instituted an action for declaratory judgment to challenge both Sections 484-h and 484-i in general and to enjoin appellees from enforcing these two sections.

The appellants' challenge rests solely upon the premise that State Legislatures cannot enact legislation prohibiting the sale to minors of material which can be sold to adults. The attack, however, is not based upon any particular provision of the statute, nor upon any particular

factual circumstances. It is, in short, a presentation of an abstract legal issue divorced from the specific case or controversy which is required to invoke Supreme Court jurisdiction [U. S. Constitution, Article III, Section 2].

Although declaratory judgment and injunctive action have been utilized in many cases involving obscene works, these remedies are employable only where the threat of adverse legal action and the likelihood of irreparable harm is imminent. But absent the specific threat of criminal prosecution, no justiciable controversy exists [*cf. Bunis* v. *Conway,* 17 A. D. 2d 207 (4th Dept. 1962); *R & H Publishing Co.* v. *Garrett,* 151 F. Supp. 903 (N. D. Ind. 1957); *Sunshine Book Co.* v. *McCaffery,* 4 A. D. 2d 643 (1st Dept. 1957); *Kingsley Int'l Pictures Corp.* v. *Blanc,* 396 Pa. 448, 153 A. 2d 243 (1959); *In re Louisiana News Co.,* 187 F. Supp. 241 (E. D. La. 1960); *Reed Enterprises* v. *Corcoran,* —— F. 2d —— (D. C. Cir. 1965)]. And this Court has consistently refused to render advisory opinions where there is a dispute of a hypothetical or abstract nature as in the present case. *Alabama* v. *Arizona,* 291 U. S. 286 (1934).

POINT II

Sections 484-h and 484-i of the Penal Law are constitutional.

This Court has made the pointed suggestion that statutes such as the instant two might well be drawn. In *Jacobellis* v. *State of Ohio,* 378 U. S. 184 (1964), the Court said:

> "State and local authorities might well consider whether their objectives in this area would be better

served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination'' (at p. 195).

The real question presented by the instant case is whether the rights of children are as broad under the First Amendment as those of adults. Our statutes are replete with regulations excluding children from rights which all adults enjoy by virtue of the Constitution. Few would contend, and none successfully, that those of immature years have a constitutional right to vote by virtue of the Fifteenth and Nineteenth Amendments. Nor may it be said that children can bear arms free from restraints of an adult society. Children not only do not have the freedom to practice a profession, they may legally be deprived of almost all freedom for the best part of their waking day. In school, they are subjected rightfully and lawfully to restraints that for an adult would be false imprisonment. Thus, despite the vigorous protests of the children, adults arrogate the right to indoctrinate them in the discredited axioms propounded by Euclid.

In many areas, the Legislature has exercised the authority to place restrictions on the young that would be invalid for adults. The laws of New York contain numerous examples: *e.g.*, restrictions on marriage without parental consent [Dom. Rel. L. §§15, 15a], voting [Election L. §150], employment [Penal L. §485, 485-a; Labor L. §§130-140, 172, 173], driving [Veh. & Traf. L. §501 (1) (b)], admissions to certain places of entertainment [Penal L. §484], sales of liquor and tobacco [Penal L. §484(3),

484(5); Alcoholic Bev. Control L. §65] and sexual intercourse [Penal L. §2010].

The rights of children, then, are not as broad as those of adults, nor should they be. Since children are not only immature in years but in the development of their minds and emotions it is proper to protect them from the icy winds of the steep slopes of adulthood. The Legislature has undertaken the responsibility of studying the protections needed by the young. It has found that the sale of "pocket books," photographs and magazines "devoted to the presentation and exploitation of illicit sex, lust, passion, depravity, violence, brutality, nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" [Penal Law, Section 484-e]. Given the urgency of the need to protect children, the Legislature justifiably imposed sanctions on selling them certain proscribed material. It is this material, some of which may not be prohibited to adults, that is kept from children who have not yet grown into the full maturity of their constitutional rights.

Nor does the age criterion become arbitrary because the proscription occurs in a field normally within the protection of the First Amendment. As John Stuart Mill, one of the champions of free speech, wrote in 1859:

> "It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by

> others must be protected against their own actions as well as against external injury" [Mill, on Liberty (Oxford Univ. Press ed.) 15; see also Chafee, Free Speech in the United States (1941), 314-315, 543].

This Court has consistently held that freedom of expression under the First Amendment is not an absolute but that there can be limited exceptions where the public interest requires [*Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 441 (1957); *Near* v. *Minnesota,* 283 U. S. 697, 703 (1931)].

Statutes such as those challenged here are a proper and limited restriction, for by the same stroke, they impose a desirable protection of children from indecent material, and afford a broader guarantee to adults of the right to read whatever they wish. Extensive legislative hearings lay behind the enactment of the predecessor statute [1954 Report, Leg. Doc. (1954) No. 37, p. 11; 1955 Report, Leg. Doc. (1955) No. 37, pp. 10-11, 179-83; 1956 Report, Leg. Doc. (1956) No. 32, pp. 12-13; 1962 Report, Leg. Doc. (1962) No. 77; 1963 Report, Leg. Doc. (1963) No. 81]. The legislative committee found that a large and increasing number of books and magazines appealing to adolescents' prurient or perverted interests were displayed "well within the view and grasp of curious adolescents." The conclusion drawn from eleven years of patient investigation deserves recognition by the courts. Such a flood of salacious literature deprives parents of their right to guide their young in their choice of reading matter. Some prohibition on the sale of materials, therefore, is a valid exercise of the legislative prerogative to restore parental control in the interests of vulnerable youth.

At the same time, by specifically directing themselves to the distribution to minors, these statutes enhance the freedoms of adults. As long as salacious literature is sold, there will be outcries about the threatened degradation of the young. If children can be protected only by the operation of a general obscenity statute, then there will always be pressure to restrict the right to read. Such pressure tends to extend the borders of "obscenity." For example, some years ago in Detroit the assistant prosecutor, whose task it was to determine the legal status of books thought possibly obscene by the police, employed the following criterion: "If I feel I wouldn't want my 13-year-old daughter reading it, I decide it's illegal." [Wall, *Obscenity and Youth: The Problem and a Possible Solution,* 1 Criminal Law Bulletin, No. 8, p. 28, at p. 31.] Protect children by a special statute and much of that pressure will disappear.

Conclusion

We respectfully submit, therefore, that the appeal should be dismissed because no substantial federal question has been presented for the decision of this Court.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

KEATING, J.:

Appellants challenge the power of the State to prohibit sales, to persons below a certain age, of literature not "obscene" within existing judicial standards for suppression of sales to the general public.

In 1963, appellant Bookcase Inc. was prosecuted for selling a book, "The Memoirs of a Woman of Pleasure" (better known as "Fanny Hill"), to a person under the age of 18 in violation of former section 484-h which prohibited sales to persons under 18 of any book "the cover or content of which exploits, is devoted to, or is principally made up of descriptions of illicit sex or sexual immorality * * *". Though the defendant was convicted initially, the judgment was later reversed and former section 484-h was held unconstitutional (*People* v. *Bookcase, Inc.*, 14 N Y 2d 409).

In response to the rulings of this Court in *Bookcase* (*supra*) and in *People* v. *Kahan* (15 N Y 2d 311), the Legislature in 1965 added the present section 484-h (L. 1965, ch. 327) which has the same objective but is far more detailed and applies to those under 17, and section 484-i (L. 1965, ch. 372) which is a similar provision for persons under the age of 18.

Appellants are now seeking a judgment declaring these new sections unconstitutional. Their challenge, however, is limited *solely* to the power of the state to pass such statutes. They are *not* challenging (as they did in *Bookcase*, *supra*) the particular statutes on grounds of vagueness, lack of

proper scienter requirements, and other problem areas normally involved in a constitutional challenge to the validity of obscenity laws.*

This Court held in *Larkin* v. *G. P. Putnam's Sons* (14 N Y 2d 399) that "Fanny Hill" was *not* obscene and could be sold to the general public, but appellants admit that the book does fall within the prohibition of sections 484-h and 484-i as regards sales to persons under 17 or 18. Appellants argue that such a distinction on the basis of age is an unconstitutional infringement upon the freedom of the press.

The decisions of the Supreme Court of the United States and of this Court have indicated that a concept of variable obscenity for the protection of children, in a properly-drawn statute, is not only within the power of our Legislature but is a desirable and even necessary provision. The statutes in question embody that concept and we uphold the validity of such a concept.

Appellants' challenge stems from the following Supreme Court statement: "Our holding in *Roth*** does not recognize any state power to restrict the dissemination of books which are not obscene." (*Smith* v. *California*, 361 U. S. 147). Since, appellants argue, this Court has ruled that "Fanny Hill" is not obscene, its distribution is protected and the statutes restricting its dissemination are uncon-

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* Appellant in *People* v. *Tannenbaum* (17 N Y 2d ——), decided this day, did challenge section 484-i on grounds of vagueness and lack of proper scienter requirements. [This is in error, *People* v. *Tannenbaum* was not decided (J. A. K. B.).]

** *Roth* v. *United States* (354 U. S. 476).

stitutional. It is worthwhile, therefore, to go back to *Roth* and trace the development in the Supreme Court of the concept of obscenity.

Roth was heard and decided together with *Alberts* v. *California,* one being a violation of a Federal obscenity statute and one a State statute. In upholding both convictions, the Supreme Court stated that obscenity was outside the constitutional protection intended for speech and the press and defined obscene material as that which deals with sex in a manner appealing to the prurient interest; that is, material having a tendency to excite lustful thoughts and utterly without redeeming social importance. The test was said to be "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (*Roth, supra,* at p. 489).

After *Smith* (*supra*), in which the Court shed additional light on the *Roth* tests, the Court, in *Jacobellis* v. *Ohio* (378 U. S. 184), held that under its tests for obscenity a certain film was not obscene and therefore a conviction under a state statute for exhibiting it to the general public could not be sustained. Indicative of the lack of certainty in this area was the fact that no majority opinion could be agreed upon and no less than six separate opinions and one concurrence without opinion were filed. Nevertheless, though there was disagreement on the *Roth* tests and its application to the particular film and statute in question, certain principles were gleaned, upon which a majority of the justices appeared to agree.

Appendix A

The opinion of Mr. Justice Brennan, who wrote for the Court in *Roth* and *Smith,* concurred in by Mr. Justice Goldberg, contained the following suggestion to the States:

> "We recognize the legitimate and indeed exigent interest of States and localities throughout the Nation in preventing the dissemination of material deemed harmful to children. But that interest does not justify a total suppression of such material, the effect of which would be to 'reduce the adult population * * * to reading only what is fit for children.' *Butler* v. *Michigan,* 352 U. S. 380, 383. State and local authorities *might well consider whether their objectives in this area would be better served by laws aimed specifically at preventing distribution of objectionable material to children, rather than at totally prohibiting its dissemination.*" (*Jacobellis,* at p. 195, emphasis added.)

Since the conviction in question was for exhibition at large and not merely to children, the judgment, according to Mr. Justice Brennan, had to be reviewed under the strict standard applicable on a national basis. The implication was that in a statute limited to "distribution of objectionable material to children", state or local interests would be determinative.

In a dissenting opinion concurred in by Mr. Justice Clark, the Chief Justice recognized that the use to which materials are put—not the words or pictures themselves—must be considered in determining obscenity. "A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time,

'obscene' in the extreme when sold or displayed to children." (at p. 201).

Finally, in the recent case of *Mishkin* v. *New York* (383 U. S. 502), appellant argued that the books in question did not satisfy the prurient-appeal requirement because they did not appeal to the prurient of the average person. The court rejected the argument as being an unrealistic interpretation of the requirement:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. * * * We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group * * *."

The clear implication of these cases is that material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Appendix A

The decisions of our own Court point to a similar result. In *Bookcase* we struck down the predecessor of section 484-h because it was too broad and too obscure in its coverage, but we did not challenge the power of the Legislature to provide different standards for children. (See dissenting opinion per Scileppi, J., at p. 424.)

This was spelled out more clearly in *People* v. *Kahan* (*supra*), where the *Per Curiam* opinion repeated that *Bookcase* "implied that a constitutionally valid statute defining obscenity in its impact on the young, as distinguished from obscenity in respect of adults, might emerge under careful draftsmanship." Judge Fuld added in his concurring opinion: "* * * I have no doubt that such a law, punishing the sale or distribution to children of matter deemed objectionable, under criteria that would not be permissible if applied to adults, may be drafted so as not to violate the constitutional guarantees of freedom of expression" (at p. 312).

The fact that sections 484-h and 484-i do not employ the word "obscene" itself does not mean that they are attempting to restrict constitutionally protected materials. There is no magic in the word "obscene." The Supreme Court has used it as a shorthand for those matters beyond the protection of the First Amendment and has attempted to define it. That court itself, however, has recognized not only that its success in defining "obscene" is limited but also that by necessity such definition must be somewhat imprecise and elastic.

The fact is that the new statutes attempt to state an even more precise definition of what is beyond the First Amendment protection than does the mere shorthand term,

"obscene". For example, section 484-h uses, instead of the word "obscene", a three-point definition—1) predominantly appeals to the prurient, shameful or morbid interest of minors, 2) is patently offensive to prevailing standards of what is suitable for minors, and 3) is utterly without redeeming social importance—which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (*"Memoirs"* v. *Massachusetts,* 383 U. S. 413, ——.)

It is clear that there is no such thing as "obscenity in the air"—that is, obscene matter does not exist in a vacuum but can be found only by reference either to the group *to* whom the matter is directed or *from* whom it is barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also *U. S.* v. *31 Photographs,* 156 F. Supp. 350 (S.D.N.Y. 1957).) When the "adult only" type of statute is tested, as here, the reference point is the community of minors.

Since, then, material is not inherently "obscene" or unprotected, but its obscenity varies with the circumstances of its dissemination, the fact that "Fanny Hill" was deemed not obscene for sale to the general public in New York should in no way preclude a determination that it is harmful to minors or "obscene" as regards the community of those below 17. This type of solution meets the problems both of protecting our young from the impact of sordid literature and at the same time protecting mature

adults from deprivation of material that is not obscene *to them.*

Appellants, however, challenge the assumption that children need *any* special care or concern. They argue that constitutional freedoms know no bounds according to age, that the mind of the child is not to be nurtured under the banner of the State, and that approval of these statutes would be a long and dangerous step toward sanctioning government control over ideas and thoughts—the censoring of literature, then religion, and then political ideologies for fear they would "harm" children.

We find it unnecessary to review the various State and Federal hearings placed before us in *Bookcase* which "amply demonstrate the damaging effect sordid pictorial and written sex literature have upon the development in children of a wholesome attitude and outlook on this very important area of life" (Dissenting opinion per Burke, J., at p. 422), but we do point out that our own Legislature has declared by law that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state" (Penal Law, §484-e).

As for the charge that our Legislature will become a monstrous censor, outlawing the theory of evolution and what not, we prefer to think better of our elected representatives and see no need to act in apprehension of such censorship. While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religious and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the

freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. As the Chief Judge has written:

> "Obscenity, real, serious, not imagined or puritanically exaggerated, is today as in all the past centuries, a public evil, a public nuisance, a public pollution. When its effective control requires censorship, I see no reason why democratic government should not use democratic processes on a high administrative level, under the control of the courts, to suppress such obscenity." Desmond, *Legal Problems in Censoring*, 40 Marquette L. Rev. 38, 56 (1956).

The Legislature, after many years of careful study, has decided that certain kinds of written matter, though suitable for adult consumption, should be kept away from children. A prior statute with that objective was ruled unconstitutional for vagueness. The challenge here to sections 484-h and 484-i does not include such grounds. We hold only that the Legislature has the constitutional power to pass such a statute. Questions of vagueness and scienter requirements must await other cases. (See *Tannenbaum, supra.*)

The judgment below should be affirmed.

* * * * *

Judgment affirmed, with costs. Opinion by Keating, J. All concur; Fuld, J., in result, except Van Voorhis, J., who dissents and votes to reverse upon the ground that jurisdiction should not be assumed to render declaratory judgment of a question of constitutionality in the abstract without ruling upon the validity of any particular statute.